

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**MOTION TO COMPEL EXPERT DISCOVERY
REGARDING DR. THOMAS GINN**

COMES NOW, the Plaintiff, the State of Oklahoma (“the State”), and pursuant to Fed.R.Civ.Pro. 37(a), respectfully moves the Court to enter an Order compelling the Cargill Defendants to: (1) produce Dr. Thomas Ginn (“Dr. Ginn”) for a second deposition, wherein he will be required to answer all questions concerning information he generated and obtained in his role as a consulting expert and project manager for consulting work conducted in connection with this case, including all information contained in materials produced after April 13, 2009; (2) produce all documents and other information that Dr. Ginn received from any of the Defendants’ consulting experts or which Dr. Ginn himself generated as a consultant in connection with this case; and (3) strike the “redaction log” produced to the State on April 14, 2009 and immediately provide the State with non-redacted copies of all materials listed on the “redaction log.”¹

In support of this Motion, the State shows the Court as follows:

¹ During a telephonic hearing held on April 16, 2009, the Court directed the State to file a brief on the issue of whether the Cargill Defendants should be required to produce certain withheld discovery concerning Dr. Ginn. The Court’s directive came after lengthy face-to-face discussion between counsel for the State and counsel for the Cargill Defendants on this issue. Thus, the State believes it has satisfied all “meet-and-confer” obligations.

Introductory Statement

Dr. Ginn has acted in the capacity of both a consulting expert and a testifying expert at different times during the life of this litigation. As of today, Dr. Ginn is a full-fledged testifying expert who has provided a Rule 26(a) expert report and been subjected to a deposition. Nonetheless, the Cargill Defendants have taken the position that Dr. Ginn's previous consultant status renders certain information he obtained by virtue of his consulting work non-discoverable under the work product doctrine. The Cargill Defendants' position in this regard is contrary to law.

The facts are clear. Dr. Ginn has offered opinions as a testifying expert on the impacts of poultry and phosphorus on biological resources in the Illinois River Watershed ("IRW"). Dr. Ginn has also served not only as a consulting expert in his individual capacity, but also as the project manager for all of the consulting work conducted by Exponent for the Cargill Defendants regarding the fate, transport, source and dynamics of pollutants and resulting biological issues in the IRW. As part of this work, Dr. Ginn selected project team members, directed the work of the biological issues team, managed the consulting work, received the work and analysis of the Exponent consultants, attended presentations by the Exponent consultants and made regular reports to the Cargill Defendants on the work conducted by the Exponent consultants. Despite these facts, counsel for the Cargill Defendants are refusing to produce any information they deem unrelated to his expert report and have directed Dr. Ginn not to answer questions about consulting work performed by Exponent. In addition, the Cargill Defendants produced only some undefined subset of the documents in Dr. Ginn's possession relating

to that work, produced these documents the day before his deposition and submitted a redaction log for that subset of documents.

Because Dr. Ginn has been offered as a testifying expert, the Cargill Defendants cannot withhold selected portions of information he obtained in connection with his work in this case. The Cargill Defendants cannot use the work product doctrine as both shield and sword. In general, the work product privilege is lost when otherwise protected information is disclosed to and reviewed by a testifying expert. And it is a well-established rule of law that any ambiguity as to whether a witness considered certain information in forming his opinion as a testifying expert should be resolved in favor of disclosure. Here, at a minimum, there are ambiguities in the record as to whether Dr. Ginn considered information obtained from consulting experts -- and information he himself generated as a consultant -- in forming his opinions. Thus, that information must be disclosed to the State. The Motion to Compel should be granted.

Statement of Facts

The Cargill Defendants initially retained Dr. Ginn as a consulting expert in 2005. Ginn Depo. at 208:1-6; 209:3-12 (Ex. A). Originally, the Cargill Defendants requested that Dr. Ginn evaluate information available for the IRW and provide “general consulting advice” as to what data was available and what that data said. *Id.* at 183:12-20.

As the project progressed, Dr. Ginn became the project manager over a group of consultants employed by a firm called Exponent. Ginn Depo. at 208:5-7; 211:10-12 (Ex. A). Two “teams” of consultants were formed, a “transport fate source dynamics” team and “biological issues” team. *Id.* at 209:1-12. Dr. Ginn worked directly with the “biological issues” team and was involved in selecting the members of the “transport fate

source dynamics” team. *Id.* at 211:17-20. Importantly, Dr. Ginn also received and reviewed reports from the “transport fate source dynamics” team and was made aware of that team’s analytical results. *Id.* at 213:1-13. The two “teams” conducted joint presentations and meetings with their clients. *Id.* at 210:15-15. In fact, Dr. Ginn himself presented status reports to the Cargill Defendants that included information about the work of both the “biological issues” team and the “transport fate source dynamics” team. *Id.* at 228:17 – 229:8.

In addition, Dr. Ginn has “looked at some water quality data” and briefed the Cargill Defendants on the potential effects of nutrients on biological systems. Ginn Depo. at 189:24 – 190:8; 192:13-16 (Ex. A). Dr. Ginn also reviewed phosphorus concentration data for the IRW. *Id.* at 194:14-18. Further, Dr. Ginn revealed during his deposition that he was aware that Exponent consultants were evaluating data concerning the contribution of poultry waste to phosphorus levels in the IRW. *Id.* at 202:3-20.

Despite his initial role as a consulting expert, Dr. Ginn was transitioned to a testifying expert around May of 2008. Ginn Depo. at 218:8-17 (Ex. A). Dr. Ginn served his expert report on the State on January 30, 2009. Ginn Report (Ex. B). Among Dr. Ginn’s various opinions and analysis offered as a testifying expert are opinions about the impact of poultry litter application in the IRW, including its impact on biological resources such as fish and benthic macroinvertebrates. Ginn Depo. at 216:20 – 217:1 (Ex. A) (“...I do discuss some analyses I did as far as the -- the density of upstream poultry houses and the relationship to fish communities so to that extent, I am -- I am doing some of those analyses.”); Ginn Report at §§ 2.1 – 2.3 (Ex. B). Dr. Ginn also offers opinions in his report concerning the impacts of urban land use on the IRW. *Id.* at

217:2-9. *See also* Ginn Report at § 6.5.3 (Ex. B) (“I independently calculated estimates of percent urban land use... I used these estimates of urban land use with the fish metrics, sub-basin sizes, and our estimates of poultry house density at each station to determine if there was a relationship with percent urban land use, or inter-relationships between factors.”); *Id.* at § 5.3.3.2 (claiming that “there is no relationship between the presence of Cargill contract growers and breeder operations and the health of the fish community when fish sample stations that are located closest in the downstream direction from one or more Cargill contract growers are evaluated.”)

Such opinions appear to have a clear relationship to the work performed by the “transport fate source dynamics” team. Yet, during Dr. Ginn’s deposition, counsel for the Cargill Defendants repeatedly instructed Dr. Ginn not to answer questions about the investigation and analysis conducted by these consultants. *See, e.g.*, Ginn Depo., pp. 213:1-20; 215:11-19; and 217:10-18 (Ex. A). Counsel made these objections despite the fact that the Exponent consultants’ work was shared with Dr. Ginn and would have clear implications regarding opinions as to any relationship between the location of poultry houses or urban land use and observed environmental and biological effects. The Cargill Defendants also have withheld production of certain materials generated by the Exponent consultants, including *all* materials generated by the “transport fate source dynamics” team, which were reviewed by Dr. Ginn during the course of his work on this case.

Additionally, on April 14, 2009, the day before Dr. Ginn’s deposition, the Cargill Defendants produced to the State a substantial volume of previously undisclosed materials. Ginn Depo. at 185:16 – 187:1 (Ex. A). Many of these materials as produced include redactions. It also appears that the materials produced on April 14 were only a

subset of the materials generated by the “biological issues” team. Counsel for the Cargill Defendants has acknowledged that Dr. Ginn may have reviewed these materials three or four years ago, but also claims that these materials are “not something he is *relying* upon for the opinions in his report.” *Id.* at 188:6-9 (emphasis added). For his part, Dr. Ginn could not testify that the materials produced on April 14 had no relationship with the opinions in his report. *Id.* at 186:15-24. Dr. Ginn also does not know why these materials were not produced until the day before his deposition (*Id.* at 185:22-23) and counsel for the Cargill Defendants offered no clear explanation for the delay. *Id.* at 187:5-21. In any event, counsel for the State clearly was not given adequate time to review the large volume of materials prior to the deposition.

Concurrent with the tardy production of considered materials on April 14, the Cargill Defendants also served a “redaction log” on the State. Redaction Log (Ex. C). During a telephonic hearing before Magistrate Judge Cleary, counsel for the Cargill Defendants claimed that “in order to protect the privilege of the work of a separate consulting expert, [the Cargill Defendants] generated a two-page redaction log that reflects that certain parts of e-mails and documents that were unrelated to Dr. Ginn’s expert report have been redacted.” Ginn Depo. at 263:10-14 (Ex. A). However, counsel’s representation to the Court in this regard is belied by the record. Dr. Ginn testified that several of the entries on the redaction log include information he considered, or could have considered, in drafting his report. *See, e.g.*, Ginn Depo. at 219:1 – 220:13; 222:2-24; 223:16 – 224:2.

The State is filing this Motion in accordance with the Court's April 16 directive to submit a brief regarding whether the withheld consulting expert information and materials should be produced.

Argument

PROPOSITION: THE CARGILL DEFENDANTS SHOULD BE COMPELLED TO PRODUCE DISCOVERY REGARDING ALL CONSULTING EXPERT INFORMATION CONSIDERED BY DR. GINN IN FORMING HIS OPINIONS.

Rule 26(a)(2)(B) provides that litigants must produce “the data or other information considered by the [testifying expert] witness in forming the opinions.” “Documents are ‘considered’ under Rule 26(a)(2)(B) if the expert has read or reviewed the...materials before or in connection with forming his or her opinion.” *JB ex rel. Palmer v. ASARCO, Inc.*, 225 F.R.D. 258, 261 (N.D.Okla. 2004) (quoting *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W.D.Va. 1998)). As used in Rule 26(a)(2)(B), “considered” is a broader term than “relied upon” and “includes the material the expert examines but rejects.” *ASARCO*, 225 F.R.D. at 261 (citation omitted).

“Courts have held that **ambiguity** as to whether a witness considered certain materials in forming his or her opinion as a testifying expert **should be resolved in favor of disclosure.**” *Id.* (citing *Messier v. Southbury Training Sch.*, 1998 WL 422858, at *4 (D.Conn.)) (emphasis added). Importantly for our purposes here, “[a]ny **ambiguity as to the role played by the expert** when reviewing or generating documents **should be resolved in favor of the party seeking discovery.**” *B.H. v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 661 (N.D.Okla. 2005) (quoting *B.C.F. Oil Refining, Inc. v. Consolidated Edison Company of New York, Inc.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997)) (emphasis added).

The rationale for this rule favoring disclosure was explained by the Court in *Western Resources, Inc. v. Union Pac. Railroad Co.*, 2002 WL 181494 at *9, n. 13 (D.Kan.) as follows:

[T]o determine whether an expert “considered” materials, *as that term is commonly used*, would require the court to explore the expert’s subjective mental processes and risks the creation of an unwieldy rule that would provide uncertainty as to the protected status or work product or other privileged materials. The Court believes it is important for practitioners to have a more definitive rule under which they can determine whether waiver has occurred. **This is so even if the testifying expert avers under oath that he did not actually consider such materials in formulating his opinion.**

(emphasis added). See also *ASARCO*, 225 F.R.D. at 262 (quoting *Western Resources*).

Here, the Cargill Defendants incorrectly assert that a clear line has been drawn between Dr. Ginn’s former role as a consultant and his current role as a testifying expert. Although the subject matter of the work performed by the team of consultants known as the “transport fate source dynamics” team plainly appears to be related to Dr. Ginn’s opinions as a testifying expert (*e.g.*, the potential causes / sources of environmental injury in the IRW), the Cargill Defendants argue that any information Dr. Ginn obtained from these consultants is off limits as protected work product. The Cargill Defendants have also withheld certain information Dr. Ginn obtained from his work with the “biological issues” team, despite the fact that Dr. Ginn’s expert report contains opinions relating the impacts of phosphorus on biological resources in the IRW. The Cargill Defendants have gone so far as to redact some portion of the consulting materials produced the day before Dr. Ginn’s deposition -- even though Dr. Ginn testified that he actually considered portions of this redacted information in forming his opinions. It is unclear how the Cargill Defendants determined that only a portion of the consulting expert materials should be produced. The Cargill Defendants’ refusal to produce this information is

improper. The State is entitled to the production of all information “read or reviewed” by Dr. Ginn “before or in connection with” forming his opinions, even if such information was not “relied upon” but rejected. *ASARCO*, 225 F.R.D. at 261.

Dr. Ginn’s *former* status as a consulting expert is of no material consequence with respect to the Cargill Defendants’ assertion of work product protection. “A party cannot use work-product as a sword and at the same time invoke the work-product doctrine as a shield to prevent disclosure of the same or related materials.” *B.H.*, 239 F.R.D. at 658 (citation omitted). Yet, this is precisely what the Cargill Defendants are doing here with Dr. Ginn by attempting to segregate certain consultant information from other, related information.

As a general matter, “[a]ny type of work product or other privilege is lost when the material is disclosed to and considered by a testifying expert.” *ASARCO*, 255 F.R.D. at 261 (citing *Johnson v. Gmeinder*, 191 F.R.D. 638, 646-47 (D.Kan.2000)). In order for the Cargill Defendants to successfully invoke work product protection here, they must demonstrate: (1) a clear delineation between Dr. Ginn’s “shifting roles” from consultant to testifying expert; and (2) a distinction between information “having **no relation to**” Dr. Ginn’s role as an expert and those considered by him in developing his expert opinions. *B.H.*, 239 F.R.D. at 660 (emphasis added) (citation omitted).

As demonstrated above, the Cargill Defendants cannot make this showing. Taken as a whole, Dr. Ginn’s testimony does not establish that there is “no relation” between the information the Cargill Defendants seek to protect and his opinions as testifying expert. While Dr. Ginn repeatedly refused to answer questions about the relationship between the consulting information and his opinions, the available facts, if anything, show that there

is a relationship between the consulting expert information and Dr. Ginn's opinions. For instance, there appears to be a logical connection between the work done by both the "transport fate source dynamics" and "biological issues" teams and Dr. Ginn's opinions concerning "the density of upstream poultry houses and the relationship to fish communities" and impacts of phosphorus on biological resources of the IRW, including fish and benthic macroinvertebrates. Ginn Depo. at 216:20 – 217:1 (Ex. A); Ginn Report at §§ 2.1 – 2.3 (Ex. B). Further, the relationship between Dr. Ginn's work as a consulting expert and his work as a testifying expert is demonstrated by the redaction log. Dr. Ginn himself could not readily identify which of the redaction log items he did and did not consider in preparing his opinions in this matter. Finally, Dr. Ginn was the project manager for all of the Exponent consulting work on this case and was responsible for making regular reports to the client concerning *all* aspects of the consulting work being performed.

It is difficult to conceive that information generated to evaluate phosphorus contributions and associated biological issues is unrelated to Dr. Ginn's opinions as testifying expert, which include analysis of the sources and impacts of pollutants on biological resources in the IRW. At the very least, there is significant ambiguity as to what consulting information Dr. Ginn considered and what he did not consider. Under such circumstances, the Cargill Defendants cannot successfully invoke work product protection.² The *Western Resources* decision is instructive on this point. In *Western*

² Under questioning from counsel for the Cargill Defendants, Dr. Ginn claimed that the redacted information in the redaction log was not related to his opinions in this case. Ginn Depo. at 385:20 – 386:2 (Ex. A). However, as shown *supra*, this claim is contradicted by Dr. Ginn's testimony under questioning by counsel for the State. And in any event, disclosure of materials reviewed by a testifying expert is favored "even if the

Resources, the plaintiff retained the expert in question as a consultant/non-testifying expert in anticipation of litigation. Six years later, the plaintiff converted the expert from consulting to testifying status. In response to extensive discovery requests from the defendant, the plaintiff claimed privilege for certain documents relating to the expert's "separate and distinct capacities" as a "consulting expert retained in anticipation of litigation," and "a consulting expert retained for purposes other than anticipation of litigation." *Western Resources*, 2002 WL 181494, at * 1. In this regard, the *Western Resources* Court held and reasoned as follows:

"Although it may never be possible to conclusively determine whether [the expert] reviewed the documents as a consultant/non-testifying expert in the prospective...lawsuit or whether they informed his expert opinion in this case as well, there exists, at a minimum, an ambiguity as to the capacity in which [the expert] generated or reviewed these materials. Where this is so, the Court must resolve the dispute in favor of discovery."

Western Resources at *13 (citation and quotation omitted). *Western Resources* is very much on point. On the record here, it would seem that Dr. Ginn's opinions may very well have been influenced by information he obtained through his role as a consulting expert -- particularly in light of the apparent overlap between his work as a consulting expert and a testifying expert and his role as project manager for all aspects of the project. Still, it is probably not possible at this point to make a definitive determination on this issue for each piece of information. Therefore, the Court should compel Dr. Ginn to disclose *all* information that he obtained from the consulting experts -- and in his own capacity as a consulting expert -- in connection with this case. The Court should also allow the State to conduct a second deposition of Dr. Ginn, wherein he will be required to

testifying expert avers under oath that he did not actually consider such materials in formulating his opinion." *Western Resources, Inc. v. Union Pac. Railroad Co.*, 2002 WL 181494 at *9, n. 13 (D.Kan.).

answer all questions concerning information he generated and obtained in his role as a consulting expert and project manager for consulting work conducted in connection with this case.

Also, given the late production of materials and the redaction log, the State should be permitted to fully depose Dr. Ginn regarding these tardy materials and why a redaction log was produced. The Cargill Defendants should be compelled to produce unredacted versions of all of these materials, and the State should be permitted to depose Dr. Ginn regarding the unredacted documents. Under the facts here, *none* of consulting information can properly be kept from the State, and the State should be permitted full deposition and document discovery regarding *all* of this information.

WHEREFORE, premises considered, the State requests that the Court grant the State's Motion to Compel.

Respectfully submitted,

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I certify that on the 27th day of April, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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